

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs January 28, 2009

CLINT T. MELTON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 73934 Kenneth F. Irvine, Jr., Judge

No. E2008-01277-CCA-R3-PC - Filed July 22, 2009

The petitioner, Clint T. Melton, appeals as of right from the Knox County Criminal Court's denial of his petition for post-conviction relief alleging multiple trial court errors, vindictive prosecution, and ineffective assistance of counsel. After the appointment of counsel, amendments to the petition and a full evidentiary hearing, the trial court denied relief. On appeal, the petitioner contends that he should have been granted post-conviction relief based upon his allegation of ineffective assistance of counsel. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Albert J. Newman, Jr., Knoxville, Tennessee, attorney for appellant, Clint T. Melton.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Zane Scarlett, Assistant District Attorney General, State of Tennessee.

OPINION

The record reflects that the petitioner was convicted by a Knox County Criminal Court jury of aggravated robbery and attempted aggravated robbery; the trial court imposed consecutive sentences of thirty years as a career offender for the aggravated robbery conviction and fourteen years as a persistent offender for the attempted robbery conviction. The petitioner's convictions and sentences were affirmed on direct appeal to this court. State v. Clint T. Melton, No. E1999-02090-CCA-R3-CD, 2000 WL 1545050 (Tenn. Crim. App. Oct. 19, 2000), app. denied, not for citation (Tenn. July 16, 2001). The petitioner filed a timely petition for post-conviction relief on December 17, 2001, alleging that various trial court errors, prosecutorial misconduct, and instances of ineffective assistance of counsel entitled to him to a new trial.

The petitioner's testimony at the evidentiary hearing concentrated on his allegations concerning trial counsel's performance. He stated that trial counsel met with him approximately five times outside of courtroom appearances and trial. He testified that his main defenses at trial were mistaken identity and alibi. Regarding his alibi defense, the petitioner stated that he asked trial counsel to interview Patricia Maples. He acknowledged that trial counsel reported to him that Ms. Maples was angry with the petitioner and would not make a good witness. The petitioner also testified that his mother had receipts to corroborate his alibi defense. However, his mother died prior to the evidentiary hearing, and the petitioner did not present any receipts at the hearing.

Regarding his claim of mistaken identity, the petitioner testified that none of the witnesses reported the perpetrator having tattoos and that the petitioner had numerous tattoos. When asked how he could prove the existence of the tattoos prior to the August 1, 1998 offense date, the petitioner testified that he told trial counsel to present at trial file photographs from the Federal Bureau of Investigation, Tennessee Bureau of Investigation, local law enforcement agencies, and prison officials that would show his tattoos. He claimed trial counsel was ineffective for failing to present these records in support of his claim of mistaken identity. The petitioner also claimed that his truck, while gray as reported by the witnesses, was distinctively "shot up" with bullet holes – something that no witness had noted.

As another allegation of ineffective assistance of counsel, the petitioner testified that trial counsel was deficient for advising him against testifying based upon her concerns about his criminal history because, he believed, none of his criminal history could have been used to impeach him since he had been restored his full citizenship rights after serving his time. When asked if he believed that counsel had performed well in his case in light of his acquittal on fifteen of the seventeen counts, the petitioner stated, "I don't think she was successful. I believe the State did not shoulder its burden of proof."

Patricia Maples testified that she was with the petitioner for approximately two hours on the afternoon of the offense. She stated that trial counsel interviewed her at her home while her husband was there and that she was scared because she did not want her husband finding out about her relationship with the petitioner. She acknowledged that she told trial counsel that she did not want to testify, but she claimed that she would have testified had she been subpoenaed. After the petitioner's arrest, Ms. Maples changed her cell phone number because she did not want her husband to find out about their relationship. She testified that their affair was a mistake.

Trial counsel testified that Ms. Maples contacted her shortly after the petitioner's arrest and told her that "she would not be a witness under any circumstances for [the petitioner], that she was not with him; and that if [trial counsel] contacted her, she would bury him." Sometime after the petitioner's indictment, trial counsel was able to hire an investigator and the two of them visited Ms. Maples at her home. Trial counsel testified that Ms. Maples' husband was not at home during their "lengthy meeting" and that they would have accommodated Ms. Maples' concerns and met somewhere else had Ms. Maples asked. After the interview, trial counsel determined that Ms. Maples would not make a very credible witness and that "[s]he certainly provided a window for [the

petitioner] to have very easily committed the crime.” Trial counsel testified that she had regular meetings with the petitioner and that they thoroughly discussed Ms. Maples’ testimony. The petitioner indicated to trial counsel that he suspected Ms. Maples had turned him in to the police so he had no desire for her to testify at trial. Trial counsel stated that there was never a question that an alibi defense would not be presented at trial.

Trial counsel stated that the main defenses at trial were mistaken identity and avoiding a kidnapping conviction because the petitioner had been noticed that such a conviction would result in an automatic life sentence. Trial counsel obtained 911 tape recordings of calls made by several individuals reporting the vehicle and tag number involved in the robbery. The tag number ultimately linked the petitioner to the offenses. She recalled discussion about receipts but stated that neither the petitioner nor his mother ever presented any receipts to her for use at trial. Trial counsel testified that she was relieved that the petitioner had been acquitted of the kidnapping charges and avoided the life without parole sentence. She recalled that the case presented “a difficult set of facts [with] . . . very credible witnesses.”

At the conclusion of the evidentiary hearing, the post-conviction court made findings on the record. The post-conviction court found that the alleged claims of insufficient evidence, problems with jury instructions, admission of hearsay evidence, constitutionality of sentencing findings, bias of Detective Clowers, and vindictive prosecution had all been previously determined or that the petitioner had failed to meet his burden of proof to merit relief. Regarding the petitioner’s claims of ineffective assistance of counsel, the post-conviction court found that the petitioner failed to prove deficient performance in trial counsel’s investigation and presentation of the mistaken identification defense. The post-conviction court accredited the testimony of trial counsel and found that an alibi defense could not have been supported based upon trial counsel’s conversations with Ms. Maples; thus, trial counsel’s decision not to present an alibi defense was not deficient. The post-conviction court also found that trial counsel was not deficient in advising the petitioner not to testify based upon his criminal record. Finally, the post-conviction court found that trial counsel adequately met with the petitioner and that there was no proof of prejudice based upon this allegation.

On appeal, the petitioner argues that trial counsel committed ineffective assistance of counsel by failing to present photographs of his tattoos in support of his claim of mistaken identity, by failing to present Ms. Maples as an alibi witness, and by advising the petitioner not to testify based upon what he asserts are stale convictions. The State argues that the petitioner failed to prove his allegations of ineffective assistance of counsel by clear and convincing evidence and that the post-conviction court properly denied relief. Following our review, we agree with the State.

ANALYSIS

The burden in a post-conviction proceeding is on the petitioner to prove his allegations of fact supporting his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, we are bound by the trial court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456

(Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-372 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

The petitioner asserts that trial counsel was ineffective for failing to prove the existence of his tattoos prior to the date of the offense in support of his mistaken identity defense. He argues that trial counsel should have presented photographs from his prison records and other law enforcement agencies. As noted by the State, on direct appeal this court commented that, had the proper foundation for admission of the photographs been made at trial, "the proof fails to establish the relevancy of the photographs." Additionally, we cannot conclude that trial counsel was deficient for failing to exhibit photographs of the petitioner that would have necessarily indicated his extensive prior involvement with law enforcement. Similarly, we conclude that the post-conviction court correctly found that trial counsel was not deficient in advising the petitioner against testifying given his criminal record that would have subjected the petitioner to impeachment pursuant to Rule 609 of the Tennessee Rules of Evidence.

The petitioner also contends that trial counsel was ineffective in failing to present an alibi defense through Ms. Maples. However, as admitted by Ms. Maples at the evidentiary hearing, she was hesitant to testify, and even hostile at times, given the nature of her relationship with the petitioner. Trial counsel determined that an alibi defense could not be supported with Ms. Maples testimony. The post-conviction court found that trial counsel did not perform deficiently under these circumstances. We conclude that the record supports the findings of the post-conviction court.

CONCLUSION

In consideration of the foregoing, the judgment of the post-conviction court denying the petition for post-conviction relief is affirmed.

D. KELLY THOMAS, JR., JUDGE